

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**REPLY COMMENTS OF THE
MONTANA PUBLIC SERVICE COMMISSION**

I. Overview

The Montana Public Service Commission (MPSC) submits these reply comments in response to the Federal Communications Commission's (Commission) inquiry regarding the establishment of sustainable new unbundling rules pursuant to 47 U.S.C. Sections 251(c) and 251(d)(2) of the Communications Act of 1934, as amended.

The MPSC submitted its opening comments on October 4, 2004. In response to the Commission's request for comments in this proceeding, the MPSC opened a docket and solicited input and comments from interested persons and parties in Montana regarding the issues raised by the Commission.¹

In response to the MPSC's request for comments, Blackfoot Communications (Blackfoot) and OneEighty Communications (OneEighty) submitted joint comments to the MPSC on October 12, 2004. No other comments were received. The MPSC did not hold an evidentiary proceeding to establish unbundling rules in Montana. The MPSC did

¹ MPSC Docket No. N2004.9.157, Notice of Opportunity to Comment issued September 28, 2004.

not hold a proceeding to implement the Commission's Triennial Review Order. The conclusions reached by the MPSC in this filing are reached based in part on the initial comments filed with the FCC and in part by the comments received in response to the MPSC's request for comments. These comments are not based on a Montana proceeding in which evidence was taken and cross examination of witnesses taken.

II. Summary of Comments Received and Response to Comments Filed with the Commission

In determining what network elements should be made available to competitors, the Commission must consider whether failure to provide access to a certain network element would impair the ability of a competing carrier to provide services 47 U.S.C. §251(d)(2). The procedural mechanism used to reach a conclusion about whether network elements must be made available or not has been the focus of the Commission's efforts to establish a list of network elements subject to unbundling.

In setting out a list of elements that must be made available to competitors, the MPSC respectfully requests that the Commission consider the events that took place in Montana and the evidence that is available from which a conclusion regarding the Montana market can be drawn.

The MPSC concludes that Qwest's failure to introduce any evidence that would support a finding that CLECs in Montana can compete with Qwest without access to Qwest's network elements necessarily means that competing carriers must have access to Qwest's network to compete, and Qwest did not challenge that presumption when it had the opportunity to do so. Qwest did challenge the Commission's presumption of impairment contained in the TRO in other states in its region, and records were

developed based on evidentiary proceedings as to whether CLECs in certain states in Qwest's region need access to Qwest's network to compete. Qwest did not proceed with such a challenge in Montana. The MPSC concludes that Qwest's failure to proceed with that challenge in Montana means that failure to provide access to a certain network elements, specifically high capacity loops, switching and dedicated transport, would impair the ability of a competing carrier to provide those services in Montana.

Qwest's failure to present any evidence is in itself evidence that CLECs in Montana are impaired without access to Qwest's network elements. Qwest did not challenge the presumption of impairment in the TRO as to dedicated transport and local loops. Qwest withdrew its challenge to the presumption of impairment regarding mass market switching. Consequently, no evidence was taken in Montana that would support a conclusion that CLECs are not impaired without access to Qwest's facilities. The MPSC concludes that CLECs must have access to Qwest's network at TELRIC rates in order to compete in Montana.

Blackfoot and OneEighty have filed comments that set forth an extensive explanation of why it is critical that they have access to Qwest's network at TELRIC rates in order to compete. The MPSC reiterates that no evidentiary hearing was taken, and interested persons and parties were not provided an opportunity to respond to comments filed in response to the MPSC's request for comments in this docket. Therefore, the comments of Blackfoot and OneEighty have not been challenged by any party or subjected to any form of cross examination or response. The MPSC nevertheless deems it appropriate to attach the comments of Blackfoot and OneEighty to these reply comments in support of the conclusion that CLECs in Montana are impaired without

access to Qwest's network, and that the Commission should conclude that in Montana, local loops, switching and dedicated transport should remain on a list of required network elements that are to be available at TELRIC rates.

In attaching the comments of Blackfoot and OneEighty the MPSC is not attesting to the veracity of the conclusions therein, or taking the position that these conclusions result from an evidentiary proceeding and hearing. The MPSC has concluded from the lack of a proceeding in Montana that no non-impairment finding can be supported in this market, and the comments of Blackfoot and OneEighty support that conclusion. The MPSC submits these comments for the Commission's consideration, and defers to the Commission with respect to how much deference or weight should be granted to the comments of Blackfoot and OneEighty considering that they are the position advocated by two facilities based CLECs competing in the Montana market.

Because Qwest withdrew its TRO proceeding in Montana, there was no reason for and no opportunity to challenge the Commission's determination regarding impairment in the TRO. This proceeding is the only occasion the CLECs have had to advocate to the MPSC and to the Commission via the MPSC that CLECs in Montana are impaired without access to high capacity facilities. For that reason, the MPSC attaches the comments of Blackfoot and OneEighty to this filing.

III. Specific Comments

The Commission has specific comments in the following two areas: the need for a national finding of impairment pending a granular market analysis, and special access.

a. Pending Granular Market Analyses, The FCC Should Make A National Finding of Impairment

Contrary to the position of some parties the FCC should not make a national finding or presumption of no impairment for unbundled transport, loops and switching.² This MPSC recommendation is consistent with the above noted comments of Blackfoot and OneEighty Communications (see page 25 of their attached comments). The FCC should not begin with the contrary presumption that markets are not impaired as the circumstances that exist in other states do not exist in Montana. The MPSC will illustrate this point with Montana evidence. Also, if the FCC should ask the states to provide it detailed information on the extent of competition, states should have no less than 12 months to collect that data for the FCC.

The FCC should base any finding of no impairment upon state-specific evidence. The evidence should be granular and the findings should be based upon a separate analyses of impairment for specific geographic and customer markets. The geographic market analysis should be no less than a wire center. The product market should be well defined. There should be a separate consideration of residential and business markets.

There are numerous small and isolated rural areas in Montana for which there may be no real alternatives to an ILEC's services. For example, Southern Montana Telephone (SMT) and Verizon Wireless negotiated an interconnection agreement in MPSC Docket D2004.8.141. The evidentiary record indicates that because there is

² See Comments of Qwest Communications International Inc., October 4, 2004 (page 2).

no direct ability to interconnect locally (by switching in SMT's remote wire centers) that the two parties must rely upon a third party's transport services in order to switch -- exchange -- traffic. There is but one party that provides that transport service to exchange traffic. That provider is Qwest. Just as SMT serves relatively small and isolated Montana communities Qwest also serves such communities in Montana.

Qwest serves numerous central offices or wire centers in Montana which are like SMT's in that they are small and have relatively few access lines. As the states only non-rural carrier Qwest serves nearly two dozen central offices in which it has less than 1000 business and residence lines. The average number of lines in Qwest's central offices is about 5,000 lines and of 72 CLLI (Common Language Location Identifier) coded central offices that it serves only six have in excess of 20,000 lines. (Source: Communication of October 18, 2004 from the FCC to Montana PSC staff and based upon 12/31/02 data) As with SMT's small wire center, it would be an error to presume that there are both competitive supplies of switches or transport facilities available in each rural exchange in Montana. Rather than make such presumptions, data should be first collected on the availability of alternative sources for switching and transport.

In regard to the competitive substitutes for basic local exchange service, the MPSC does not believe that wireless service is a substitute for a wireline ILEC's basic exchange services. (see the Montana PSC's circa May 28, 2004 comments in the FCC's WC's IP-Enabled Services Inquiry, FCC WC 04-36) The MPSC is again in agreement with Blackfoot and OneEighty Communications on this point (see attached Comments at page 5). In addition to its comments in WC 04-36, the MPSC

also submits supporting national evidence filed by Western Wireless (Late Filed Exhibits in Montana docket D2003.1.14) indicating that between 1999 and 2003 ILECs lost 25 million lines and CLECs gained 19 million lines for a net change of 6 million lines; at the same time, wireless companies gained 70 million lines. Only a slim minority of wireline customers appear to substitute wireless service for their wireline service.

The MPSC agrees with Blackfoot and OneEighty Communications' observations on the limited availability of other intermodal sources of competition (see attached comments at pages 5-7). The MPSC is aware of initial efforts to provide cable telephony in Montana but there is no evidence that such options will be ubiquitously available in all of Qwest's Montana wire centers. There is no evidence that sufficient infrastructure is in place that would support VoIP communications in all of Qwest's Montana small wire centers or even in all of Qwest's large wire centers.

b. Special Access

The MPSC agrees generally with those initial comments asserting that special access should not be deemed relevant to an impairment analysis.³ In this regard the MPSC also agrees with the comments of Blackfoot and OneEighty Communications (see attached comments at pages 13-18) The Commission's reasons for not supporting the inclusion of special access stem from a combination of circumstances. Subscriptions to Qwest's special access rates are almost entirely subscriptions to the FCC's tariffed rates. The FCC's tariffed rates by Qwest's own admission provide Qwest implicit subsidies to, in turn, serve universal service purposes (see January 26, 2004, Docket No. D2002.7.87,

³ See for example the October 4, 2004 comments of the Association of Local Telecommunications Services (ALTS) et. al., pages 4, 8-10.

Order No. 6435b, Findings of Fact 107 and 108).⁴ Because these special access rates provide implicit universal service subsidies they must be priced above cost. And because they are priced above cost, these tariffed special access rates do not appear an economic option for CLECs.

IV. Conclusion

In developing rules as to which network elements must be made available to competitors under 47 U.S.C. §251(d), the FCC should require dedicated transport elements (DS1, DS3, and dark fiber), mass market switching and local loops be made available to competitors in markets where the incumbent did not challenge at the state level the FCC's findings presuming CLEC impairment without access to those elements. This conclusion is supported by the comments filed with the MPSC from Blackfoot and OneEighty, which were the only comments received in response to the MPSC's request for comments. This conclusion is also supported by the evidence we submit regarding the constraints faced by SMT and Verizon Wireless; those constraints most likely reoccur in the small wire centers that Qwest serves. In addition, the FCC should not ascribe relevancy in its consideration of impairment to the special access services offered by

⁴ Finding of Fact 108: "*Easton also notes Qwest receives about \$23.5 million dollars annually almost all of which is from FCC approved prices that are not based on any costing method and are meant, apparently, to provide Qwest implicit subsidies. While recognizing efficiency gains induced by commingling and ratcheting, Qwest is concerned that access-charge reductions may harm universal-service efforts but admits to no awareness of any FCC or Montana Commission reference to universal service in the pricing of special access services (pp. 6, 7).*"⁴ Easton acknowledges that estimates are complicated by, and depend upon, the mix of local interconnection and special access on, and the number of, special access facilities and relative use factors on two-way trunks. Because proportional pricing (ratcheting) requires individual rates for each channel on facilities, Qwest estimates that the cost to implement billing systems would require investments and coding work with a cost in excess of \$5 million." (emphasis added, footnotes excluded)

Qwest. The FCC should not attribute any relevancy for the reasons that Blackfoot and OneEighty raise (see attached comments) but also because of the circumstances we illuminate that arose in Qwest's wholesale cost docket in Montana.

The MPSC concludes that in Montana, the market requires local loops, switching and dedicated transport be available as unbundled network elements.

The MPSC reiterates its conclusion, provided in its opening comments, that agreements negotiated by a carrier to fulfill its obligations under 47 U.S.C. §251(b) and (c) must be filed with state commissions for review and approval, and that state commissions should determine in the first instance whether an agreement must be filed under 47 U.S.C. §252.

Respectfully submitted this 19th day of October, 2004, by

THE MONTANA PUBLIC SERVICE COMMISSION

Chairman Rowe dissents in part from these comments.